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In The

Supreme Court of the United States

Supreme Court, U.S.
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E. ROBERT SEAVER, C

No. 71-

SAUL HELLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Statement

Petitioner, SAUL HELLER, prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York (the Chief Judge and an Associate Judge dissenting), rendered the 1st day of December, 1971, affirming the order of the Supreme Court of the State of New York, Appellate Term, First Department,

one Justice dissenting, which in turn, had affirmed the judgment of the Criminal Court of the City of New York, convicting the petitioner of violating Section 235.05 of the New York Penal Law (obscenity in the portrayal of a motion picture — "Blue Movie," a product of the efforts of Andy Warhol).

The petitioner herein is an attorney at law and was sentenced to pay a fine of $250 or 30 days in jail. The fine has been paid.

Opinion Below

The Opinion of the New York Court of Appeals is reproduced in the Appendix to this petition. The Order and Dissent of the Appellate Term is also included.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257(3). The Order of the New York Court of Appeals was rendered the 1st day of December, 1971 and this petition is being filed within 90 days thereof. A copy of the Order of Affirmance is annexed hereto and reproduced in the Appendix.

The Questions Presented for Review

1. Whether a State Court (New York Court of Appeals) may blatantly disobey a ruling of the United States Court of Appeals by refusing to grant an adversary hearing prior to the seizure of a movie film, in view of the determination by the United States Court of Appeals, Second Circuit,

that such an adversary hearing is required?

2. A movie film entitled "Blue Movie," restricted to audiences over the age of 18 years, was seized without a prior adversary hearing having been afforded to the petitioner. Since the United States Court of Appeals for the Second Circuit ruled that a prior adversary hearing must be granted in such cases, did the New York Court of Appeals violate the supremacy clause of the United States Constitution, as well as the First and Fourteenth Amendments thereof, by holding that the courts of the State of New York need not grant prior adversary hearings in such cases? (Bethview Amusement Corp. v. Cahn, 416 F.2d 410 [1969], cert. denied 397 U.S. 920; Astro Cinema Corp. v. Mackell, 422 F.2d 293 [1970].)

3. Whether a movie film may ever be seized without a prior adversary hearing?

4. Whether the film here in question, "Blue Movie," was in fact obscene within the purview of Roth v. United States, 354 U.S. 476, in view of the facts that there was no pandering or solicitation, and no one under the age of 18 was permitted to buy a ticket or to see the film?

5. Whether a movie film which may be viewed by thousands of people can be equated with a single book, or should it be equated with many books (Marcus v. Search Warrants, 367 U.S. 717; and, A Quantity of Books v. Kansas, 378 U.S. 205)?

Historical Facts

The factual situation is not of paramount importance. The petitioner was manager of the

Garrick Theatre on Bleeker Street in Greenwich Village which, on July 29, 1969, was showing a movie called "A Blue Movie" [sic]. There is no doubt but that absolutely no one under the age of 18 years was permitted into the theatre and that there was no pandering or solicitation for patrons to enter the theatre.

On July 31, 1969, a criminal court judge, Honorable Arthur H. Goldberg, at the request of Assistant District Attorney Beckler, went to this theatre and viewed the movie between 3:40 p.m. and 5:20 p.m.

This viewing was precipitated by an earlier attendance at the theatre by two police officers on July 29, 1969, namely Deputy Inspector Charles Smyth and Lieutenant Sullivan (Smyth 24-27; Goldberg 14, 16-19).*

Immediately after the showing of the movie, without any notice to the petitioner, and without any adversary hearing, the Judge signed a search warrant right outside of the theatre ordering the seizure of the film and also executed three arrest warrants because

> "It was and is my opinion that that film is obscene, and was obscene as I saw it under the definition" (Goldberg 14-15, 23).

"Blue Movie" consists of three reels of color film which run for over one hour and forty-five minutes, excluding interruptions. All of the judges

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* Numerals in parentheses refer to the Record on Appeal in the Court of Appeals of New York.

in the courts below viewed the film and, in each instance, the movie was ruled obscene although there were dissents, namely two judges, including the Chief Judge and an associate judge in the Court of Appeals, and one justice in the Appellate Term of the Supreme Court.

It is not relevant to this petition to go into all of the facts beyond this since this recitation crystallizes the issues. There were differences of opinion as to whether or not the movie was or was not obscene. This is one major issue raised in this Court. Perhaps a more important issue, however, is whether or not an adversary hearing should have been held prior to the issuance of the search warrant since there was no emergency nor was there any danger to the community. A seizure of this film effectively precluded further showings since there were no other prints readily available.

THE ISSUE OF UNLAWFUL SEARCH AND SEIZURE IS PROPERLY BEFORE THIS COURT.

The respondent has previously conceded that the petitioner properly preserved the issue of unlawful search and seizure and was anxious for the return of the film which had been seized. The respondent, in the Court below, in its brief on page 20, admitted:

> "It appears therefore that in the unusual circumstances here, the issue of the seizure was preserved for review."

There is, therefore, no dispute between the parties hereto about the jurisdiction of this Court to review the issues being raised, namely whether or not a seizure of the film was justified without an adversary hearing having been held, and whether or not the prosecution was justified in retaining the film, as it still does.

Argument

Point I.

THE COURT BELOW BLATANTLY DEFIED THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BY RULING THAT A MOVIE FILM COULD BE SEIZED WITHOUT A PRIOR ADVERSARY HEARING. THIS WAS DIAMETRICALLY CONTRARY TO RECENT HOLDINGS OF THE UNITED STATES COURT OF APPEALS TO WHICH THE ATTENTION OF THE NEW YORK COURT OF APPEALS WAS SPECIFICALLY CALLED. THIS VIOLATED THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND ALSO THE FIRST AND FOURTEENTH AMENDMENTS THEREOF.

The case at bar presents a conflict which should be resolved by this Court since the United States Court of Appeals and the New York Court of Appeals have taken diametrically opposite positions on the same issue.

In the case at bar, the New York Court of Appeals was apprised of the rulings of the United States Court of Appeals for the Second Circuit in the cases of Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970), and Bethview Amusement

Corp. v. Cahn, 416 F.2d 410 (1969), cert. denied 397 U.S. 920.

In both the Astro Cinema Corp. and the Bethview cases, the Second Circuit specifically declared that adversary hearings were required before warrants could be issued for the seizure of a movie film.

In rejecting this view, the New York Court of Appeals' majority declared, inter alia:

> "...The decisions of the Second Circuit in Astro Cinema Corp. v. Mackell ... and Bethview Amusement Corp. v. Cahn ..., requiring adversary hearings before warrants are issued, go beyond any requirement imposed on State courts by the Supreme Court."

The supremacy clause of the United States Constitution, Article VI, Section 2, requires that State courts defer to Federal courts in such conflicts (Gibbons v. Ogden [1824], 9 Wheat. 1, 6 L. Ed. 23).

In such other cases as Mapp v. Ohio, 367 U.S. 643 and Miranda v. Arizona, 384 U.S. 436, this Court has pre-empted State courts' decisions in the area of search and seizure and confessions respectively, and has directed that where inconsistent with the determinations of this Court, the State courts must change their determinations. This is also exemplified by the decision in Lee v. Florida, 392 U.S. 378.

The issue, therefore, in the case at bar, is very clearly framed since it is manifest that

where the State of New York's highest Court deliberately refuses to obey a determination of the United States Court of Appeals, that a serious jurisdictional conflict is presented which should be resolved by this Court. This is especially so where the State's highest Court declares that it is obeying the policies of the United States Supreme Court in its refusal to obey the determinations of the United States Court of Appeals.

If this Court fails to resolve this conflict, litigants will obtain one result in the Federal Court of Appeals, but a different result in the New York State courts. This would be an intolerable situation.

It is respectfully submitted that the United States Court of Appeals is correct and that the First Amendment as well as the Fourteenth Amendment requires that prior adversary hearings be granted before a movie film is seized.

In the case at bar, the seizure of the film effectively precluded the showing of the movie since there was no other print readily available.

Even if that were not the case, however, the risk of criminal prosecution and further seizure would be adequate deterrents. In addition, the petitioner, as well as the owners of the film, have suffered tremendous economic loss.

We submit that the respondent is probably just as anxious to resolve this dilemma.

Point II.

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SPECIFICALLY RULED IN SIMILAR CASES THAT A PRIOR ADVERSARY HEARING HAD TO BE HELD BEFORE THE SEIZURE OF ANY FILM ALLEGED TO BE OBSCENE. NO SUCH ADVERSARY HEARING WAS HELD IN THE CASE AT BAR AND THE NEW YORK COURT OF APPEALS HAS DECIDED TO DISOBEY THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

This Court is faced with a conflict between two jurisdictions, namely the State of New York and the Second Circuit. In the case at bar, a film was seized without a prior adversary hearing having been held. A motion to suppress and to return the film is properly before this Court and, in addition, the issue of whether or not an adversary hearing ought to have been held is likewise directly raised. In Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970), and Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (1969), cert. denied, 397 U.S. 920, the Court of Appeals for the Second Circuit declared that a prior adversary hearing had to be permitted and conducted before any seizure of a movie film could constitutionally be effectuated.

The New York Court of Appeals has decided to ignore this ruling, thus placing it in direct conflict with the United States Court of Appeals in this Circuit.

It is indeed a dangerous precedent which is being set.

We submit that this Court should resolve this conflict. For the reasons set forth in Astro Cinema Corp., supra, and Bethview Amusement Corp., supra, this Court should direct that an adversary hearing must be held prior to the seizure of any film.

No emergency is presented by the showing of a film such as the one in the case at bar where, admittedly, no one under the age of 18 was permitted to see it and there is no indication that there was any pandering or solicitation.

Point III.

"BLUE MOVIE" IS NOT OBSCENE AND OUGHT NOT HAVE BEEN BANNED FOR THAT REASON ALONE. THERE WAS NO CLAIM OF "PANDERING" OR "EXPLOITATION OF ITS SEXUAL CONTENT."

It is submitted that since there is no claim of "pandering" or "exploitation of the sexual content" of "Blue Movie," coupled with the fact that no one under 18 could gain admittance, that the movie was not "obscene" and should not have been seized and banned (see, Dissent in Court of Appeals by Chief Judge Fuld and Judge Gibson, infra).

Cain v. Kentucky, 397 U.S. 319;
Redrup v. New York, 386 U.S. 767.

The movie does not show any perverted acts of contacts between the actors and there are numerous films now being shown which are far

more explicit than anything shown in the "Blue Movie."

Since Stanley v. Georgia, 394 U.S. 557, prohibits seizure of any film used for private recreation of a non-commercial nature, we maintain that it is a logical next step to prohibit any seizure of a movie such as the one at bar which is not being pandered or exploited and which is not available to children or anyone else, except those willing to pay about $5 to see it. Why ought any adult be deprived of the right to see any form of entertainment which does not cause any clear and present danger to society?

The suppression of a movie such as the one herein, banal perhaps, but certainly not a threat to law and order, smacks of "thought control" and is a clear violation of the First and Fourteenth Amendments. This Court should once and for all put an end to the selective suppression of material within the First Amendment's purview.

Conclusion

The Petition for Certiorari should be granted and the Judgment Convicting the Petitioner Heller should be reversed and the film returned.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

- - - - - - - - - - - - - - - -

App. T. 1. No. 184. 71
The People &c.,
Respondent,
vs.
Saul Heller,
Appellant.

- - - - - - - - - - - - - - - -

BERGAN, J.:

The film "Blue Movie," subject of this prosecution under Penal Law, Section 235.05, is simple pornography unrelieved by any merit. Acts of sexual intercourse are portrayed, actual or simulated, accompanied by a series of sexual manifestations and movements.

The elements which must be established to satisfy the constitutional protection afforded by the First Amendment to freedom of expression as laid down by Roth v. United States (354 U.S. 476) are established in this prosecution. The statute itself meets the Roth standards (Overstock Book Co. v. Barry, 436 F.2d 1289 [2d Cir., 1970]).

Those elements justifying prosecution by the State and meeting Federal constitutional requirements are that the dominant theme of the production as a whole appeals to prurient interest in

sex; is patently offensive as an affront to community standards; and is without redeeming social value (Redrup v. New York, 386 U.S. 767 [1967]; Memoirs v. Massachusetts, 383 U.S. 413 [1966]; Jacobellis v. Ohio, 378 U.S. 184 [1964]).

There are, of course, a number of cases holding that in particular publications or films these tests were not met and prosecution would not lie. A recent example is Cain v. Kentucky (397 U.S. 319) where the Court of Appeals of Kentucky (437 S.W. 2d 769) was reversed. It is not fruitful, however, by detailed differentials addressed to values that are better or worse, or to explicit or less explicit sexuality, to find guidance in deciding obscenity cases. Decision cannot reasonably be grounded on adding and subtracting obscenity points, one case to another.

The needs of adjudication must, as a practical matter, be met by such mature and objective judgment as judges are able to bring to it. A majority of this court, having viewed the film, is in agreement with the trial court and the Appellate Term that the film is obscene, and that prosecution is not interdicted by the First Amendment.

Appellant argues also that before the warrants issued for the seizure of the film and for his arrest, he was entitled to an adversary hearing before the judge who issued them on the question of the film's obscenity.

The procedure followed here was that the judge attended the public theatre at which the firm was

exhibited and, on seeing it, concluded there was probable cause to institute prosecution and issued the warrants.

This independent judicial action met fully the basic rule laid down, in Marcus v. Search Warrants (367 U.S. 717) as later analyzed in the several opinions in A Quantity of Books v. Kansas (378 U.S. 205); that the seizure of evidence as obscene, and arrests on this ground, should not be left to the judgment of policemen, but should have judicial supervision.

It was noted, on this issue in Marcus, that the warrants for a very large number of magazines and books (11,000 copies) were issued "on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials" (pp. 731-732). That is certainly not this case. The warrants involved here were preceded by judicial scrutiny and were the result of judicial determination.

The additional question is whether the scrutiny should have been followed by an adversary hearing. The Supreme Court has not held that; and its most recent comment on the problem suggests it is not moving in that direction (Lee Art Theatre v. Virginia, 392 U.S. 636 [1967]).

There a Virginia conviction was reversed on authority of Marcus (supra). Not only was there no judicial scrutiny in advance, but the policeman's affidavit, used as a basis for the warrant, was both subjective and general. There was an

absence of "any inquiry by the justice of the peace into the factual basis for the officer's conclusions" (p. 637). Of course, that was not enough under Marcus.

But what is of relevancy for the present case is the observation by the Supreme Court that "we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant" (p. 637). This implies that had the justice done so, as the judge in the present case did, it would have been sufficient. There is no suggestion that an adversary hearing, an extreme departure from standard American practice on warrants, would also have been required.

Thus the decisions of the Second Circuit in Astro Cinema Corp. v. Mackell (422 F.2d 293 [1970]) and Bethview Amusement Corp. v. Cahn (416 F.2d 410 [1969], cert. den. 397 U.S. 920), requiring adversary hearings before warrants are issued, go beyond any requirement imposed on State courts by the Supreme Court.

There are intrinsic procedural difficulties in requiring such hearings. The usual reason for an adversary hearing before a magistrate as to whether a warrant should or should not issue arises from a close issue as to whether there is a real basis in fact for probable cause to begin a prosecution.

But when a magistrate sees a film, it is not much help to him, or indeed to the parties, in deciding probable cause to have counsel on one

side tell him what he has just seen is obscene and on the other that it is not. He is deciding, on the warrant question, not guilt or innocence, but the prima facie sufficiency of ground to prosecute based on probable cause. The legal issue of obscenity on the merits of the charge can quickly be determined when the prosecution begins by appropriate motion.

There is a difference, too, in the impact of a wide-ranging warrant such as that in Marcus (supra) for the seizure of 11,000 publications which could amount to actual suppression of expression, and a single film which at the initial stage of the prosecution is taken merely as evidence until there has been a final adversary determination on the merits that it violates the statute.

The order should be affirmed.

Order of the Court of Appeals of the State of New York, Fuld, Ch. J. Dissenting

COURT OF APPEALS

[Same Title]

FULD, CH. J. (dissenting):

If I were to judge the film before us in terms of my personal views of its social value, of its moral and aesthetic worth, I would condemn it for

its vulgarity no less than for its banality.* However, as we declared some years ago in People v. Richmond County News (9 N.Y.2d 578, 587-588), "[b]asic principles of jurisprudence * * * command us to put to one side all personal predilections." Faithful to this injunction, I cannot but conclude that, in the light of First Amendment concepts, as reflected in the decisions of the Supreme Court (see, e.g., Cain v. Kentucky, 397 U.S. 319, revg. ___ Ky. ___, ___, 437 S.W.2d 769, 774-775; Redrup v. New York, 386 U.S. 767), the motion picture under consideration, explicit though it is in exhibiting acts of sexual intercourse, may not be stamped as obscene. So concluding, I do not reach the further question concerning the necessity for an adversary hearing prior to the court's issuance of a warrant for the film's seizure.

* * * * * *

Order affirmed. Opinion by Bergan, J. All concur except Fuld, Ch. J., who dissents and votes to reverse in an opinion in which Gibson, J., concurs.

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* It should be noted that no person under 18 years of age was ever admitted to the theatre where the picture was shown and that there was no claim of pandering or exploitation of its sexual content.

Order of Appellate Term With Dissenting Memorandum, Markowitz, J.

Appellate Term — First Department
Dated — July 15, 1971

97 PEOPLE, & CO., res. v. SAUL HELLER, def-ap — Judgment of conviction affirmed. No opinion. Streit, J.P. and Quinn, J. concur.

Markowitz, J. dissents in the following dissenting memorandum.

Whether the film before us is obscene is a question of constitutional judgment — a mixed question of fact and constitutional law — calling upon the court to make an appraisal of the film and its contents against the requirements embodied in both the State and Federal constitutions (People v. Richmond County News, 9 N.Y.2d 578, 581).

Sex and obscenity are not synonymous (Roth v. United States, 364 U.S. 476, 487). The problem of drawing "the dim and uncertain line" between proscribed obscenity and constitutionally protected expression is indeed thorny — and I recognize that this film may possibly be found to be utterly without redeeming social value. However, under the guidelines established by the United States Supreme Court and our Court of Appeals (Memoirs v. Massachusetts, 383 U.S. 413; Roth v. United States, supra, 354 U.S. 476; People v. Solomon, 26 N.Y.2d 631, aff'g determination of this court, September, 1967, No. 351, N.Y.L.J., Feb. 17, ...

* * *